

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SER:VWV:RCH:TL-N-872-99

MA Waters

date: March 24, 1999

to: Chief, Quality Measurement Branch, Virginia-West Virginia District
Attn: John Kurec

from: District Counsel, Virginia-West Virginia District, Richmond

subject: **Authority of TMP to Execute Consent**
when TMP is (b)(7)a

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ISSUE

From whom should the service solicit consents in order to extend the statute of limitations for the adjustments originating on [REDACTED] Forms 1120S for the taxable year [REDACTED] when [REDACTED] S Corporations are non-TEFRA, and the Tax Matters Person for all [REDACTED] S Corporations is (b)(7)a?

CONCLUSION

For the [REDACTED] S corporations which are non-TEFRA because of small size, separate Forms 872 should be executed by the shareholders. A separate extension under I.R.C. section 6501

should be sought from the S corporation on a Form 872 if you believe that there may be any adjustments which may result in a tax at the corporate level. The extension must be signed by a corporate officer of the S corporation in his capacity as such and, to avoid an argument that the corporate officer has a conflict of interest similar to that discussed in [REDACTED], supra, this consent should be signed by an officer other than the President of these [REDACTED] S Corporations who is (b)(7)a [REDACTED].

With regard to the [REDACTED] S Corporation which is subject to the TEFRA audit and examination procedures and for which the Tax Matters Person is (b)(7)a [REDACTED], effective statute protection can be accomplished in the following manner:

- (1) A Form 872-S should be executed by the apparent Tax Matters Person and another person other than the Tax Matters Person who is authorized by all shareholders to extend the assessment period with regard to all shareholders. The written authorization must be attached to the consent and must:
 - a. Provide that it is an authorization for a person other than the tax matters person to extend the assessment period with respect to all shareholders.
 - b. Identify the S corporation and the person being authorized by name, address, and taxpayer identification number.
 - c. Specify the S corporation tax year or years for which the authorization is effective; and
 - d. Include the signature of all persons who were shareholders at any time during the year or years for which the authorization is effective.
- (2) In addition a separate extension under I.R.C. section 6501 should be sought from the S corporation on a Form 872. This extension under I.R.C. section 6501 must specifically state that it is an extension by the corporation with respect to sub-chapter S items as defined under Temp. Treas. Reg. section 301.6245-1T. The extension must be signed by a corporate officer of the S corporation in his capacity as such.

Having another person, other than the Tax Matters Person, who is authorized by all shareholders to extend the assessment period with regard to all shareholders, sign the consent should protect against any argument that the consent is invalid because the Tax Matters Person has a conflict of interest.

FACTS

The Service currently has [REDACTED] S Corporations in [REDACTED] suspense pending (b)(7)a [REDACTED]. An officer of each of these S Corporations is (b)(7)a [REDACTED] for [REDACTED]. [REDACTED] S Corporations are Non-TEFRA since they have less than 5 individuals as the only shareholders. Also, [REDACTED] S Corporations has checked the box on the return for consolidated audit procedures. The (b)(7)a [REDACTED] signed both returns as [REDACTED] of the S Corporations. On page 2 of the Form 1120S he is identified as the Tax Matters Person.

The [REDACTED] S Corporation has [REDACTED] shareholders - [REDACTED] individuals and an estate. Thus, this S Corporation would be subject to the TEFRA procedures. The (b)(7)a [REDACTED] signed this Form 1120S in his capacity as [REDACTED]. He is also designated as the Tax Matters Person for the [REDACTED] S Corporation.

The statute of limitations on assessment for the Form 1120S expires on [REDACTED] (b)(7)a [REDACTED]

(b)(7)a [REDACTED]

ANALYSIS

Consents to Extend the Statute of Limitations for the Two S Corporations which are Non-TEFRA Entities

A. Items which are taxed at the shareholder level

The first [REDACTED] S Corporations are non-TEFRA because they have less than 5 shareholders who are all individuals. The historic Service statute of limitations practice for S corporation adjustments in this situation has been to treat the Section 6501 statute of limitations as applying at the shareholder level. Since the tax is paid at the shareholder level, the Service focuses on the shareholder's return as the relevant return for purposes of computing the limitations period of "three years after a return was filed." Accordingly, the Service monitors the statute of limitations at the shareholder level, obtaining statute extensions (Forms 872) directly from the shareholders and not from the corporation.

Prior to the Supreme Court deciding this issue, the circuit courts were split. The Ninth Circuit in Kelley v. Commissioner, 592 F.2d 756 (9th Cir. 1989) held that the reference to a "return" in Section 6501(a) was a reference to the S corporation return and, therefore, the statute of limitations had to be controlled at the corporate level. The Second, Fifth, and Eleventh Circuits held that the limitations period began on the date the individual files his return. Bufferd v. Commissioner, 952 F.2d 675 (2d Cir. 1992), aff'd, 113 S. Ct. 927 (1993); Green v. Commissioner, 963 F.2d 783 (5th Cir. 1992), cert. denied, 507 U.S. 908 (1993); Fehlhaber v. Comr., 954 F.2d 653 (11th Cir. 1992), aff'g 94 T.C. 863 (1990).

Resolving the split among the circuits, the Supreme Court, in Bufferd, supra., held that the three-year assessment period runs from the date of the shareholder's individual return, not from the date of the S corporation's return. The Court reasoned that the taxpayer's individual return is "the return" referred to in Section 6501(a), which states that the tax "shall be assessed within three years after the return was filed." The court noted that the S corporation's return does not contain all the information necessary to compute the tax, e.g., the taxpayer's adjusted basis in his S corporation stock and other items of income, loss, and credit.

In 1997, Congress amended Section 6501 to affirm the Bufferd decision and to clarify that the limitations period under Section 6501(a) begins to run from the filing of the return by the taxpayer, not from the filing of a return by any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit. I.R.C. § 6501(a), as amended by Section 1284 of the Taxpayer Relief Act of 1997, P.L. 105-34, effective for taxable years beginning after Aug. 5, 1997.

B. Items which are taxed at the corporate level

However, there are certain situations where the S corporation can have a tax liability at the corporate level. First, Section 1374 provides a corporate-level tax when the S corporation sells assets which have "built-in gains" from tax years before the election of S corporation status. Second, Section 1375 imposes a corporate-level tax on certain S corporations which have excess passive income and earnings and profits left over from tax years before the S corporation election. Since the tax paid by the corporation is characterized as a loss which flows through to the shareholders, the temporary regulations define these items as sub-chapter S items. Treas. Reg. § 301.6245-1T(a)(1)(vi)(G). It does not appear, however, that the TEFRA procedures apply to determinations involving these issues, and therefore the Internal Revenue Manual directs Revenue Agents to separately monitor the Section 6501 statute of limitations with respect to these items. IRM 4226.31(13)(18) (11-22-89). Thus, a Form 872 should be executed by an officer of the corporation other than (b)(7)a [REDACTED] This extension under I.R.C. section 6501 must specifically state that it is an extension by the corporation with respect to sub-chapter S items as defined under Temp. Treas. Reg. section 301.6245-1T.

Consents to Extend the Statute of Limitations for the One S Corporation which is a TEFRA Entity

A. Items which are taxed at the shareholder level

We have forwarded the consent issue with regard to the TEFRA entity to the National Office for their review. However, it is our opinion that effective statute protection can be accomplished in the following manner (Once we hear from the National Office we will let you know their opinion):

- (1) A Form 872-S should be executed by the apparent Tax Matters Person and another person other than the Tax Matters Person who is authorized by all shareholders to extend the assessment period with regard to all shareholders. A written authorization should be attached to the consent and must:
 - a. Provide that it is an authorization for a person other than the tax matters person to extend the assessment period with respect to all shareholders.
 - b. Identify the S corporation and the person being authorized by name, address, and taxpayer identification number.
 - c. Specify the S corporation tax year or years for which the authorization is effective, and
 - d. Include the signature of all persons who were shareholders at any time during the year or years for which the authorization is effective.)

Having another person (other than the Tax Matters Person) who is authorized by all shareholders to extend the assessment period with regard to all shareholders sign the consent should protect u against any argument that the consents are invalid because the Tax Matters Person has a conflict of interest (i.e., a (b)(7)a).

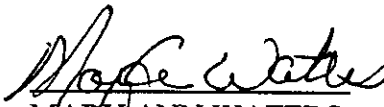
B. Items which are taxed at the corporate level

In addition, for the items, discussed above, that are taxed at the corporate level, a separate extension under I.R.C. § 6501 should be sought from the S corporation on a Form 872. This extension under I.R.C. § 6501 must specifically state that it is an extension by the corporation with respect to sub-chapter S items as defined under Temp. Treas. Reg. § 301.6245-1T. The extension must be signed by a corporate officer of the S corporation in his capacity as such, but not by the (b)(7)a

Making sure that an authorized officer other than the Treasurer signs the consent should protect against any argument that the consent is invalid because the Treasurer has a conflict of interest (i.e., (b)(7)a [REDACTED]).

If you have further questions, please contact the undersigned at (804) 771-8135.

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